

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs June 18, 2008

STATE OF TENNESSEE v. BOBBY HALE

Direct Appeal from the Circuit Court for Marion County
Nos. 7238, 7320-A, 7604, 7605 Thomas W. Graham, Judge

No. M2007-02202-CCA-R3-CD - Filed September 19, 2008

The appellant, Bobby Hale, pled guilty in the Marion County Circuit Court to four drug related felonies, and he received a total effective sentence of eight years. The appellant was placed on probation, which was revoked. After revocation of his probation, the appellant was placed on community corrections. Subsequently, a warrant was issued, alleging that the appellant had violated the terms of his community corrections sentence. Following a hearing, the trial court revoked the appellant's community corrections sentence and ordered the appellant to serve his original sentence in confinement. On appeal, the appellant challenges the trial court's imposition of a sentence of confinement. Upon our review of the record and the parties' briefs, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court are Affirmed.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which JERRY L. SMITH and ROBERT W. WEDEMEYER, JJ., joined.

Philip A. Condra (at trial and on appeal) and Jeffery Harmon (at trial), Jasper, Tennessee, for the appellant, Bobby Hale.

Robert E. Cooper, Jr., Attorney General and Reporter; Rachel West Harmon, Assistant Attorney General; J. Michael Taylor, District Attorney General; Sherry Shelton, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

On January 25, 2006, the appellant entered guilty pleas in connection with multiple indictments. Specifically, in case number 7238, the appellant pled guilty to possession of cocaine, a Class C felony, and he received a sentence of four years with sixty days to be served in jail and the remainder to be served on supervised probation. In case number 7320A, the appellant pled guilty

to the introduction of a controlled substance into a penal facility, and he received a sentence of four years with sixty days to be served in jail and the remainder to be served on supervised probation. In case numbers 7604 and 7605, the appellant pled guilty to the sale of cocaine, and for each conviction he received a four-year sentence with the sentences to be served concurrently with each other on supervised probation. The sentences for possession of cocaine and introduction of a controlled substance into a penal facility were to be served concurrently with each other but consecutively to the sale of cocaine convictions for a total effective sentence of eight years.

Subsequently, on February 26, 2007, an order was filed, revoking the appellant's probation and transferring him to the community corrections program. Thereafter, on April 4, 2007, a revocation warrant was filed, alleging that the appellant had violated the conditions of his community corrections sentence by failing to abide by the terms of house arrest, failing to obtain a DNA test, and failing to provide proof of employment. An addendum to the violation warrant was filed on April 11, 2007, alleging that the appellant had tested positive for cocaine.

A revocation hearing was held on May 15, 2007, during which the appellant's community corrections officer, Schultzie Barnes Skiles, testified that she first met the appellant at court on February 26, 2007, when he was placed on community corrections following the revocation of his probation. Skiles explained to the appellant the rules of community corrections and explained to him that he was on "total house arrest," meaning that he was to be at home when not at work or in meetings with Skiles. Skiles also told the appellant that he needed to have a DNA test and provide proof of employment.

Skiles stated that she was aware that the appellant's convictions were cocaine related. During their first meeting, she and the appellant discussed his drug problem. The appellant told Skiles that he could not pass a drug screen that day because he would test positive for marijuana and cocaine. Skiles did not test the appellant at that time, giving him time to get the drugs out of his system. However, she told the appellant that if he failed a drug screen while on community corrections, "there would be a violation with no bond."

Skiles said that she scheduled an appointment for the appellant to have a DNA test. The appellant failed to appear for the test; however, he kept an appointment with Skiles at 3:00 p.m. on the same afternoon as the missed DNA test. The appellant's only explanation for missing the test was he "just . . . didn't go."

Skiles stated that on April 5, 2007, the appellant failed a drug test by testing positive for cocaine. Skiles testified that on April 31, 2007, she went to the appellant's residence for a home visit. When Skiles arrived at approximately 9:00 p.m., the appellant's mother came out into the driveway and told Skiles that the appellant was at a neighbor's house, getting potatoes. A few minutes later, the appellant returned home from Sherry Byrum's residence. Skiles stated that Byrum was "on [her] case load" for a cocaine related offense.

Skiles said that the appellant had performed four hours of community service, paid \$229 toward court costs and fines, and attended scheduled meetings with her. The appellant told her that he worked on cars at his house, but he did not provide any paperwork to document his employment. However, Skiles received a letter from Graham Swafford stating that the appellant helped care for his disabled uncle.

The appellant's mother, Clara Hall, testified that she, her husband, and the appellant lived with the appellant's uncle at 108 Magnolia Avenue. Hall said that the appellant's uncle was a paraplegic war veteran who needed assistance doing everything and could not be left alone. Hall stated that the appellant frequently cared for his uncle, bathing and feeding him. Hall said that on the day of the scheduled DNA test, she was at an appointment in Chattanooga and the appellant was caring for his uncle. Her appointment lasted longer than she anticipated, and no one was home to relieve the appellant.

Hall was aware that the appellant was on house arrest. However, she said that she did not realize that the appellant had to be home all of the time, stating, "I didn't know he couldn't leave out of the yard." On the day of Skiles' home visit, Hall sent the appellant across the street to borrow potatoes. The appellant had been gone three or four minutes when Skiles arrived.

Hall stated that she was aware of the appellant's drug problem and believed that he needed long-term rehabilitation. She talked with the appellant about getting help for his addiction. The appellant indicated to Hall that he wanted to get help because he was expecting a child with Jessica Brackett. Hall said that the appellant had started attending church with his parents. Hall believed that the appellant was basically a good and loving person.

At the conclusion of the hearing, the trial court noted that the appellant was a forty-four-year-old "nice guy" who could not stay away from drugs, even with an "[e]ight year sentence hanging over him." The trial court asked the appellant if he wanted to get off of drugs, and the appellant responded affirmatively. The trial court then said, "Y'all take the steps necessary to get him into drug court. If they don't accept him then we'll be back here and I'm going to give him some time." The trial court recessed the hearing until a determination could be made regarding the appellant's placement in the Drug Court Program.

Another hearing on the matter was held on August 21, 2007. Dianne Hand, the area supervisor for the community corrections program, testified that she was familiar with the appellant's file. Then, the following colloquy occurred regarding the appellant's admission into the Drug Court Program:

[The State:] In regard to the Drug Court Program are at least a portion of the statements made considered to be confidential in assessing individuals for that program?

[Hale:] Yes, it is.

[The State:] All right. Is that the situation with [the appellant]?

[Hale:] That's the situation. I talked with Mrs. Glassmeyer this morning and that's what she related to me, what's said in the team meeting is to be kept confidential.

[The State:] All right. And Mrs. Glassmeyer, just for clarification is the Director of the Drug Court Program [the appellant] was referred to?

[Hale:] That's correct.

[The State:] And at this point, has [the appellant] been accepted into the Drug Court Program?

[Hale:] He has not and will not be.

The appellant objected to Hale's testimony, contending that " these statements [were] made to her by a third party who is not here that we can confront."

The trial court stated that the gist of Hand's testimony was that the appellant had not been accepted into the drug court program. The court noted that the appellant's situation was "egregious" because this was not his first violation of alternative sentencing. The court observed that the appellant had a long record of involvement with drugs and that the court had hoped "that we would be able to do something to make him realize he had a problem." The trial court said:

Whatever happened he wasn't able to convince the Drug Court and they are – if they – if they make errors at all, they make it in favor of the person who might could receive help, and so I've not had 'em just turn down somebody that really had a – had the right attitude or whatever, so anyway if it's no[t] available we can't do anything for the problem that's gotten him in here, then all I can do is just let him serve his time.

Defense counsel argued that "there are other . . . avenues for drug rehab short of drug court." The court stated that, given the appellant's long record of involvement with drugs, other rehabilitation programs were unacceptable. Therefore, based upon proof that the appellant had tested positive for cocaine, the court revoked the appellant's community corrections sentence and ordered him to serve his original sentence in confinement. On appeal, the appellant questions whether "the trial court [made] a conscientious judgment that execution of the original judgments subserved the ends of justice."

II. Analysis

Generally, community corrections sentences are governed by the Tennessee Community Corrections Act of 1985. See Tenn. Code Ann. § 40-36-101. The Act provides as follows:

The court shall . . . possess the power to revoke the sentence imposed at any time due to the conduct of the defendant or the termination or modification of the program to which the defendant has been sentenced, and the court may resentence the defendant to any appropriate sentencing alternative, including incarceration, for any period of time up to the maximum sentence provided for the offense committed, less any time actually served in any community-based alternative to incarceration.

Tenn. Code Ann. § 40-36-106(e)(4). A trial court may revoke a community corrections sentence upon finding by a preponderance of the evidence that an offender violated the conditions of his suspended sentence. See *State v. Harkins*, 811 S.W.2d 79, 82 (Tenn. 1991). The trial court's revocation of a community corrections sentence will be upheld absent an abuse of discretion. Id. An abuse of discretion occurs if the record contains no substantial evidence to support the conclusion of the trial court that a violation of community corrections has occurred. See *State v. Gregory*, 946 S.W.2d 829, 832 (Tenn. Crim. App. 1997). Moreover, we note that "an accused, already on [alternative sentencing], is not entitled to a second grant of probation or another form of alternative sentencing." *State v. Jeffrey A. Warfield*, No. 01C01-9711-CC-00504, 1999 WL 61065, at *2 (Tenn. Crim. App. at Nashville, Feb. 10, 1999); see also *State v. Timothy A. Johnson*, No. M2001-01362-CCA-R3-CD, 2002 WL 242351, at *2 (Tenn. Crim. App. at Nashville, Feb. 11, 2002).

On appeal, the appellant maintains that "the trial court implicitly recognized at the conclusion of the first hearing that a full revocation of suspension and service of the original sentences did not subserve the ends of justice." The appellant argues that, regardless of this implicit recognition,

[t]he trial court effectively left the determination of whether the Appellant would serve the original sentence in the control of a third party, the Drug Court. Yet the director of that program did not appear to testify about the requirements of Drug Court, the factors weighed by that body in granting or denying admission to that program, or the decision made in Appellant's case.

Our review of the record reveals that at the conclusion of the first hearing, the trial court found that two sentencing options were suitable following revocation of the appellant's community corrections sentence, namely drug court or incarceration. At the second hearing, the State adduced proof that the appellant had been denied placement in drug court, leaving the trial court with the only other option it found suitable: incarceration. Specifically, Hand testified that the appellant "has not and will not be" accepted into the Drug Court Program. The appellant argues that Hand's testimony

constituted impermissible hearsay. See Tenn. R. Evid. 802. We disagree. Hand, the community corrections supervisor, made no attempt to convey the reasons why the appellant was not accepted by the program. She merely advised the court that the appellant had not been accepted.

Regardless, we note that the appellant did not dispute that he had not been accepted into the Drug Court Program. Rather, the appellant argued that he could be released into an alternative rehabilitative program. In response to this suggestion, the trial court specifically stated that other drug rehabilitation programs were unsuitable, citing the appellant's long history of drug problems and continued violation of the terms of alternative sentencing. The record reflects that despite the continued largess of the trial court in granting the appellant alternative sentencing, the appellant repeatedly failed to comply with the terms of alternative sentencing. Therefore, we conclude that the trial court acted within its authority in ordering the appellant to serve his original sentence in confinement.

III. Conclusion

Finding no error, we affirm the judgments of the trial court.

NORMA McGEE OGLE, JUDGE